93 402

No. _____

Supreme Court, U.S.
FILED
SEP 2 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

DAVID L. EVANS, ET AL.,

Petitioners,

v.

HERBERT J. HEICHELBECH, III, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL J. BOWERS
Attorney General

WILLIAM C. JOY*
Senior Assistant Attorney General

PATRICIA DOWNING
Senior Assistant Attorney General

*Counsel of Record

PLEASE SERVE:

PATRICIA DOWNING
Senior Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334-1300
Telephone: (404) 656-3338

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a ward's Substantive Due Process liberty interest in avoiding unwanted hospitalization continues after he has been adjudicated incompetent, based on a finding that he is incapacitated by reason of mental disability to the extent that he lacks sufficient understanding or capacity to make significant responsible decisions concerning his person.

2. Whether Georgia's statutes providing procedures for hospitalizing a ward, which require (1) consent of the guardian, (2) a finding based on independent medical judgment that the ward is mentally ill and needs hospitalization, and (3) periodic clinical reviews, and which can be challenged in the probate court, violate the ward's right to Procedural Due Process.

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

The parties to the proceeding in the Court of Appeals and in the District Court were:

May I. Fleming

Herbert J. Heichelbech, III

James Reid, III

David L. Evans

Myers R. Kurtz

Joseph Ionno

Thomas Hall

Janet L. Heichelbech was a Defendant in the proceeding before the District Court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 7

I. THE COURT OF APPEALS ERRONEOUSLY ASSUMED THAT A MENTALLY ILL WARD'S SUBSTANTIVE DUE PROCESS LIBERTY INTEREST IN AVOIDING UNWANTED HOSPITALIZATION CONTINUES AFTER HE HAS BEEN ADJUDICATED INCOMPETENT, IN CONFLICT WITH THE TEACHINGS OF THIS COURT IN *MILLS v. ROGERS*, 457 U.S. 291 (1982) AND *PARHAM v. J.R.*, 442 U.S. 584 (1979) 7

II. THE COURT OF APPEALS ERRONEOUSLY STRUCK DOWN GEORGIA'S STATUTE PROVIDING FOR THE HOSPITALIZATION OF WARDS, BY HOLDING THAT A PATIENT WITH A GUARDIAN IS ENTITLED TO THE SAME COMMITMENT PROCEDURES AS A PATIENT WITHOUT A GUARDIAN 12

CONCLUSION 16

INDEX TO APPENDIX ..... App. i

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Addington v. Texas, 441 U.S. 418 (1979) 10

Carney v. Aicklen, 587 S.W.2d 507 (Tex.Civ.App. 1979) 11

Doe v. Austin, 848 F.2d 1986 (6th Cir.), *cert. denied*, 488 U.S. 967 (1988) 10

Estate of Leach v. Shapiro, 469 N.E.2d 1047 (Ohio 1984) 11

Guardianship of Reyes, 731 P.2d 130 (Ariz. 1986) 11

Guardianship of Roe, 421 N.E.2d 40 (Mass. 1981) ...9, 13

Heller v. Doe, ___ U.S. ___, 125 L.Ed.2d 257, ___ S.Ct. ___ (1993) 14

Hendrickson's Estate v. Hendrickson, 604 S.W.2d 17 (Mo.App. 1980) 11

Matter of Guardianship of Ingram, 689 P.2d 1363 (Wash. 1984) 11

Matter of Spring, 405 N.E.2d 115 (Mass. 1980) 11

Mills v. Rogers, 457 U.S. 291 (1982) 7, 8, 12, 13

O'Connor v. Donaldson, 422 U.S. 563 (1975) 7

Parham v. J.R., 442 U.S. 584 (1979) 7, 8, 12, 13, 14

Parratt v. Taylor, 451 U.S. 527 (1981) 15

Roberts v. Coffey, 426 P.2d 30 (Kan. 1967) 11

Rochin v. California, 342 U.S. 156 (1952) 9

Washington v. Harper, 494 U.S. 210 (1990) 12

Youngberg v. Romeo, 457 U.S. 307 (1984) 12, 13

Zinermon v. Burch, 494 U.S. 113 (1990) 7, 15

TABLE OF AUTHORITIES – Continued

Page

GEORGIA STATUTES

O.C.G.A. § 29-5-7(d)(3) 11

O.C.G.A. § 29-5-7(d)(4) 11

No. _____

In The

Supreme Court of the United States

October Term, 1993

DAVID L. EVANS, ET AL.,

Petitioners,

v.

HERBERT J. HEICHELBECH, III, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners Carl E. Roland (by substitution for David Evans in his official capacity as Director of the Division of Mental Health, Mental Retardation and Substance Abuse), David Evans (in his individual capacity), Myers Kurtz, Joseph Ionno, and Thomas Hall respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of appeals for the Eleventh Circuit entered in the above-entitled proceeding on June 4, 1993.

OPINIONS BELOW

The decision of the Court of Appeals for the Eleventh Circuit is reported at 995 F.2d 237 (11th Cir. 1993) and is

printed as Appendix "A", p. 1a, *infra*. The final decision of the United States District Court for the Middle District of Georgia is reported at 798 F.Supp. 708 (M.D.Ga. 1992) and is printed as Appendix "B", p. 3a, *infra*. The unreported initial memorandum decision of the United States District Court for the Northern District of Georgia is reprinted as Appendix "C", p. 19a, *infra*.

JURISDICTION

Respondents brought this action under 42 U.S.C. § 1983 in the Middle District of Georgia. On September 1, 1992, the District Court entered judgment in this case. Upon appeal by the Petitioners to the Court of Appeals, the Court on June 4, 1993, entered a judgment and an opinion affirming the Middle District's judgment. See Appendix "A", p. 1a, *infra*.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutes involved are:

42 U.S.C. § 1983:

Every person who, under color of statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia, shall be considered to be a statute to the District of Columbia.

The relevant provisions of the Georgia Mental Health Code and Georgia's Guardianship Statute are reprinted as Appendix "D", p. 23a, *infra*.

STATEMENT OF THE CASE

Defendants in this case are the Director of the Georgia Division of Mental Health, Mental Retardation and Substance Abuse, and the superintendent and two doctors at Central State Hospital, a hospital of the Georgia Department of Human Resources designated to receive patients for psychiatric evaluation and treatment under Georgia laws.

Plaintiff Heichelbech is a mentally ill adult who was hospitalized at Central State Hospital. Mr. Heichelbech had a history of psychiatric problems dating back to when he was one and a half years old, when he was diagnosed as mentally retarded and autistic. He was hospitalized on at least four additional occasions as a minor for periods of six or seven months at a time, and diagnosed with Schizophrenic Disorder, Disorganized Type Chronic, Intermittent Explosive Disorder, Mixed Specific Developmental Disorder, Mixed Substance Abuse, and Seizure Disorder.

On August 17, 1987, at age 21, Mr. Heichelbech fell off the roof of a building and suffered a severe head injury and the loss of sight in his left eye. Two weeks after the injury, on September 2, 1987, Mr. Heichelbech's mother and Defendant below, Janet Heichelbech, filed a Petition For The Appointment Of A Guardian For An Alleged Incapacitated Adult with the Probate Court of Bibb County, Georgia. A physician's affidavit was attached stating that Mr. Heichelbech was incapacitated and in need of a guardian. The Court ordered a physician's evaluation, and the physician reported that Mr. Heichelbech was incapacitated and that he was in need of a guardian. A hearing was held where Mr. Heichelbech had the right to a court-appointed attorney and to subpoena and cross examine witnesses. O.C.G.A. § 29-5-6(e)(3). An order was issued appointing Mr. Heichelbech's mother as guardian. Thereafter, Status Reports regarding Mr. Heichelbech's condition and placement were filed periodically with the court by the guardian.

On May 13, 1988, Mr. Heichelbech was involuntarily admitted to Central State Hospital by order of the Probate Court of Bibb County. The Order was based in part on two affidavits from his brother and sister-in-law which said that Mr. Heichelbech threatened to kill himself and others and to harm a nine week old baby. He was received by Central State Hospital and held involuntarily for treatment. On May 26, 1988, Mr. Heichelbech's mother and court-appointed guardian signed a form transferring him to voluntary status, and thereafter she continued to sign authorizations for his hospitalization and treatment.

During the time that Mr. Heichelbech was at the hospital, he was evaluated at least every six months by physicians and his treatment team. He was always found to be mentally ill and in need of hospitalization. Annually, a "Social History/Assessment" was written which specifically addressed the reasons for his continued hospitalization. The report dated July 12, 1990 stated that he remained hospitalized because of his explosive behavior as evidenced by poor impulse control, temper tantrums, threatening behavior and intimidating others. The report dated June 20, 1991 stated that Mr. Heichelbech continued to display poor impulse control with periodic temper outbursts, agitation and that he had hit another patient over the head with a telephone.

On several occasions, Mr. Heichelbech requested, either orally or in writing, to be discharged. On these occasions, he was evaluated by a physician, and it was determined that he demonstrated evidence of mental illness and was in need of hospitalization; at some but not all times he was also imminently dangerous to himself or others. At the times when Mr. Heichelbech requested discharge and was evaluated, Mrs. Heichelbech was consulted and she did not concur that discharge would be in his best interests.

During Mr. Heichelbech's care and treatment at the hospital, no one ever reported anything to the staff of Central State Hospital which was inconsistent with the assumption that Mrs. Heichelbech was acting in her son's best interests.

Mr. Heichelbech never brought a petition or otherwise challenged the guardianship in any court of Georgia.

Mr. Heichelbech never filed a petition for a writ of habeas corpus to challenge his confinement at Central State Hospital. He never filed a petition for judicial protection of rights to challenge his confinement at Central State Hospital or to complain about any other matter relating to his care and treatment at Central State Hospital.

On April 11, 1991, Mr. Heichelbech filed a Complaint in District Court alleging that his hospitalization based on the consent of his legal guardian, when he himself sought discharge, violated Georgia law and his rights to Substantive Due Process, Procedural Due Process, and Equal Protection under the Fourteenth Amendment to the United States Constitution. On July 9, 1991, the District Court ordered that Janet L. Heichelbech be added as a necessary party defendant. Mrs. Heichelbech answered the Complaint stating that her son had an adequate remedy at law in that he could petition to have her removed as guardian and that she had acted at all times in good faith and in the best interests of her son.

On September 1, 1992, the District Court entered an order partially granting Mr. Heichelbech's Motion For Summary Judgment, finding that Mr. Heichelbech had the Due Process right to be discharged from the hospital unless he were involuntarily committed through the same judicial process as an involuntary patient who had never been adjudicated incompetent. On appeal, Defendants argued that the hospital could provide treatment to Mr. Heichelbech based on (1) the authorization of his guardian and (2) the independent medical finding that he was mentally ill and needed hospitalization. The Eleventh

Circuit affirmed the District court's decision for the reasons stated in the District Court's order, without comment.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRONEOUSLY ASSUMED THAT A MENTALLY ILL WARD'S SUBSTANTIVE DUE PROCESS LIBERTY INTEREST IN AVOIDING UNWANTED HOSPITALIZATION CONTINUES AFTER HE HAS BEEN ADJUDICATED INCOMPETENT, IN CONFLICT WITH THE TEACHINGS OF THIS COURT IN *MILLS V. ROGERS*, 457 U.S. 291 (1982) AND *PARHAM V. J.R.*, 442 U.S. 584 (1979).

The Court of Appeals has erroneously decided an important federal question, in conflict with the clear leanings of this Court in *Mills v. Rogers*, 457 U.S. 291 (1982) and *Parham v. J.R.*, 442 U.S. 584 (1979). This important question impacts directly on the State's parens patriae interest in providing treatment to mentally ill wards, and it should be considered and settled by this Court.

It is undisputed that a person has a liberty interest in not being confined by the State unnecessarily for medical treatment. *O'Connor v. Donaldson*, 422 U.S. 563 (1975). However, a person's hospitalization can be voluntary based on a knowing and informed consent. *Zinermon v. Burch*, 494 U.S. 113 (1990). Further, the knowing consent for a voluntary hospitalization can be that of the parent or guardian in the case of a minor, even if the minor disagrees. *Parham v. J.R.*, 442 U.S. 584 (1979). The Court of Appeals' decision, however, would essentially preclude

the voluntary hospitalization of adults who had been adjudicated incompetent and would require their involuntary commitment, in order for the ward to receive treatment.

In *Parham*, this Court reviewed Georgia's statutory scheme for the voluntary hospitalization of a minor based on the consent of his parent or guardian and held that it was sufficient to meet Due Process requirements. Georgia's statutory scheme for the voluntary hospitalization of adult wards, at issue in this case, is essentially identical to the scheme which was found to meet Due Process requirements in *Parham*. It was concluded in *Parham* that the parents have "a substantial, if not dominant, role in the decision [to hospitalize], absent a finding of neglect or abuse, and that the traditional presumption that the parents act in the best interests of their child should apply." *Id.* at 604. The situation involving an adult ward, who has been found by the probate court to be mentally deficient so as to be incapable of making decisions in his own best interests, is analogous to that of a child, who has been determined by society to be unable to make certain decisions in his own best interests. Further, the presumption that the guardian is acting in his ward's best interests is even stronger than in the case of a parent, because the probate court has made an express finding to that effect and it reviews that finding annually.

This Court has addressed the issue of the extent of a guardian's decision-making authority in *Mills v. Rogers*, 457 U.S. 291 (1982). Certiorari had been granted on whether involuntarily committed mental patients have a constitutional right to refuse treatment with antipsychotic drugs. More specifically, the substantive due process

question was defined as whether a ward's protected liberty interest in avoiding unwanted treatment continues after he is adjudicated incompetent. This Court noted that Massachusetts had decided that specific question in the affirmative. *Guardianship of Roe,* 421 N.E. 2d 40, 52 (Mass. 1981). Therefore, this Court declined to answer that question, stating that it was "distinctly possible that Massachusetts recognizes liberty interests of persons adjudged incompetent that are broader than those protected directly by the Constitution of the United States." *Id.* Thus, this Court suggested but did not decide that a ward's constitutionally protected liberty interest in avoiding unwanted treatment does not continue after he is adjudicated incompetent. This Court should now decide this important question of federal law which impacts directly on the State's parens patriae interest in providing treatment to mentally ill wards.

The proper standard to apply to determine this substantive due process issue was extensively discussed in *Rochin v. California,* 342 U.S. 156 (1952). In order to show a substantive due process violation, the claimant must show that the government engaged in actions which "offend those canons of decency and fairness which express the notions of justice of English-speaking people" or "conduct that shocks the conscience" and "offends the community's sense of fair play and decency." *Id.* at 342 U.S. 169, 172, 173.

Applying the standards of *Rochin* to this case, delegation to a guardian of the right to consent to the hospitalization of her mentally deficient ward is not the type of conduct that would "shock the conscience" of the people. A person "who is suffering from a debilitating mental

illness" is not "wholly at liberty" and thus already has a diminished liberty interest. *Addington v. Texas*, 441 U.S. 418, 429-430 (1979). States under their parens patriae powers have traditionally allowed someone to come in to protect a person who, due to a diminished mental capacity, does not have the judgment to act in his own best interests. *Id.* There is no bright line dividing these decisions which are and ought to be made by a guardian, from those for which a judicial determination is necessary. *Guardianship of Roe*, 421 N.E. 2d 40, 52 (Mass. 1981).

It does not offend canons of decency to allow a guardian to determine that it is in his or her ward's best interests to be hospitalized, when (1) the probate court has determined that the guardian will act in the ward's best interests and (2) the hospital's medical staff has determined independently that the ward is mentally ill and needs hospitalization. It should be noted the District Court's rationale, which was adopted by the Court of appeals, never distinguished between the substantive and procedural aspects of this case, and it did not apply the proper standard as articulated in *Rochin*.[1]

---

[1] The Sixth Circuit also failed to make these distinctions in *Doe v. Austin*, 848 F.2d 1986 (6th Cir.), *cert. denied*, 488 U.S. 967 (1988), relied on heavily by the District Court below. *Doe* found that Kentucky's procedures for the admission of mentally retarded adults based on the consent of the guardian violated due process.

The state courts have delegated a broad range of powers to guardians, depending on the capacity of the individual ward. Under state laws a guardian's power traditionally includes the authority to arrange a suitable residence for the ward, as long as this power is exercised reasonably. O.C.G.A. § 29-5-7(d)(4). For example, in *Guardianship of Reyes*, 731 P. 2d 130 (Ariz. 1986), the court found that with proper evidence of incapacity, the guardian could require his ward to live in a nursing home instead of at home with her husband.[2] The guardian also may have the power to consent to medical treatment for her ward where the court finds that the ward is incapable of making such judgments himself. O.C.G.A. § 29-5-7(d)(3).[3]

Clearly, the states have traditionally delegated extensive authorities to a guardian to act on behalf of his incapacitated ward. With proper procedural safeguards, this delegation of authority is not shocking and it is justified by the states' interest in protecting and providing for its incapacitated citizens.

---

[2] *See also: Hendrickson's Estate v. Hendrickson*, 604 S.W.2d 17 (Mo.App. 1980); *Carney v. Aicklen*, 587 S.W.2d 507 (Tex.Civ.App. 1979); *Roberts v. Coffey*, 426 P.2d 30 (Kan. 1967)

[3] *Matter of Spring*, 405 N.E.2d 115 (Mass. 1980); *Estate of Leach v. Shapiro*, 469 N.E.2d 1047 (Ohio 1984); *Matter of Guardianship of Ingram*, 689 P.2d 1363 (Wash. 1984).

II. THE COURT OF APPEALS ERRONEOUSLY STRUCK DOWN GEORGIA'S STATUTE PROVIDING FOR THE HOSPITALIZATION OF WARDS, BY HOLDING THAT A PATIENT WITH A GUARDIAN IS ENTITLED TO THE SAME COMMITMENT PROCEDURES AS A PATIENT WITHOUT A GUARDIAN.

In spite of the extensive procedures provided in the probate court for the appointment of a guardian, for annual reviews of the ward's status, and for removal of the guardian, the Court of Appeals found that a ward is entitled to the same commitment procedures as a patient without a guardian. This includes another judicial hearing to determine if the ward meets the involuntary commitment standards.

This Court has repeatedly indicated a preference for nonjudicial procedures and reliance on independent medical judgment for decisions involving significant medical issues. *Washington v. Harper*, 494 U.S. 210 (1990); *Youngberg v. Romeo*, 457 U.S. 307 (1984); *Mills v. Rogers*, 457 U.S. 291 (1982); *Parham v. J.R.*, 442 U.S. 584 (1979). In *Youngberg* this Court stated that "there certainly is no reason to think judges or juries are ~~better~~ qualified than appropriate professionals in making [treatment] decisions." *Id.* at 322-323. In *Parham* the Court admonished that courts must not "unduly burden the legitimate efforts of the states to deal with difficult social problems. The judicial model for factfinding for all constitutionally protected interests, regardless of their nature, can turn rational decision making into an unmanageable enterprise." *Id.* at 608.

In *Mills v. Rogers* this Court suggested that a judicial hearing would not be required under the Constitution in order to provide treatment with psychotropic drugs to a ward against his will. The Court noted that a Massachusetts court, as a matter of a state law, expressed a "preference for judicial resolution of certain legal issues arising from proposed extraordinary medical treatment. . . . " *Guardianship of Roe, supra,* 421 N.E. 2d at 51. This Court, however, noted that its own decisions expressed a different preference, citing *Youngberg v. Romeo, supra,* and *Parham v. J.R., supra,* and it found that Massachusetts may require "greater protection of the relevant liberty interest than the minimum adequate to survive scrutiny under the Due Process Clause." *Mills v. Rogers, supra,* at 457 U.S. 303.

Yet the Court of Appeals accepted without comment the District Court's determination that a ward is entitled to a judicial commitment proceeding in order to provide hospitalization, rather than any less burdensome procedure. In so doing the Court incorrectly applied *Parham v. J.R.* and burdened the legitimate efforts of the State to provide treatment to mentally ill wards.

In *Parham v. J.R.* this Court determined that a judicial or quasi-judicial hearing was not necessary when a minor is voluntarily admitted to a hospital based on his parent or guardian's consent. The Court determined that it had an inadequate factual basis to decide if additional procedures were required if the minor contested his hospitalization and sought release. *Id.* at 442 U.S. 617. However, the Court emphasized that this decision should represent an independent judgment of what the child requires and that traditional information sources should be consulted.

Id. at 442 U.S. 607. The Court further rejected the "statist notion that governmental power should supercede parental authority in *all* cases because *some* parents abuse and neglect children" as "repugnant" to American tradition. *Id.* at 442 U.S. 603.

In this case, the Court of Appeals apparently accepted the suggestion of the Plaintiffs below that guardians used the hospital as a "dumping ground" and that the ward is a "hostage subject to the whim of the guardian." There was absolutely no factual or legal evidence to support such a position. To the contrary, this Court has recently stressed that "Guardians have a legal obligation to further the interests of their wards" and that "There is no support whatever in our cases or our legal tradition for the 'statist notion,' [citing *Parham v. J.R.*, 442 U.S. 584, 603 (1979)] that the State's expertise and concern in these matters is so superior to that of parents and other close family members" that guardians should be excluded from the decision-making process. *Heller v. Doe*, ___ U.S. ___, 125 L.Ed.2d 257, ___ S.Ct. ___ (1993).

The decision of the Court of Appeals cuts too broadly and does not serve the purpose of due process, which is to prevent erroneous hospitalizations. In this case, a hospitalization would be erroneous if the ward were not mentally ill, did not need hospitalization, or if hospitalization were not in his best interests. The due process requirements imposed by the lower court, however, would not even address two of the above criteria. Rather, the ward could be hospitalized only if he is mentally ill and imminently dangerous to himself or others. Therefore, the decision below would preclude the hospitalization of wards who need hospitalization and for whom

hospitalization would be in their best interests, unless it would be imminently dangerous not to hospitalize them.

The pre-deprivation procedures provided under the Georgia statutes provide an extensive and elaborate probate court proceeding to appoint a guardian, and an independent medical review to determine if a ward is mentally ill and needs hospitalization. Post-deprivation procedures include periodic review of the ward's progress by the medical staff, annual review by the probate court, and judicial remedies including a petition to challenge the guardianship, a petition for a judicial inquiry and protection of rights, and a petition for writ of habeas corpus. These procedural protections meet the requirements of Due Process. *Zinermon v. Burch*, 494 U.S. 113 (1990); *Parratt v. Taylor*, 451 U.S. 527 (1981).

CONCLUSION

For the above-stated reasons, Petitioners pray that this Court grant a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

WILLIAM C. JOY
Senior Assistant Attorney General

PATRICIA DOWNING
Senior Assistant Attorney General

PLEASE ADDRESS ALL
COMMUNICATIONS TO:

PATRICIA DOWNING
Senior Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334-1300

INDEX TO APPENDIX

		Page
Appendix "A"	Opinion of the Court of Appeals	1a
Appendix "B"	Decision of the United States District Court for the Middle District of Georgia dated September 2, 1992	3a
Appendix "C"	Decision of the United States District Court for the Middle District of Georgia dated March 23, 1992	19a
Appendix "D"	Relevant sections of the Georgia Code	23a

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-8983

D. C. Docket No. C.A. 91-118-1-MAC(WDO)

HERBERT J. HEICHELBECH, III,

Plaintiff-Appellee,
Cross-Appellant,

MAY I. FLEMING, JAMES REID, III,

Plaintiffs-Intervenors,
Cross-Appellants,

versus

DAVID L. EVANS, Dir. of the Div. of Mental Health, Mental Retardation and Substance Abuse of the Ga. Dept. of Human Resources, in his official capacity; MYERS S. KURTZ, Supt. of Central State Hospital, in his official and individual capacity; JOSEPH A. IONNO, M.D., Medical Director of the Regional Care Division of Central State Hospital, in his official and individual capacity; THOMAS M. HALL, M.D., Medical Director of the Long Term Care Division of Central State Hospital, in his official and individual capacity,

Defendants-Appellants,
Cross-Appellees,

JANET L. HEICHELBECH,

Defendant.

(Filed JUN 4 1993)

Appeals from the United States District Court
for the Middle District of Georgia

(June 6, 1993)

Before FAY and DUBINA, Circuit Judges, and GIBSON*, Senior Circuit Judge.

PER CURIAM:

The judgment is affirmed for the reasons and analysis set forth in the opinion of the district court published at 798 F. Supp. 708 (M.D. Ga. 1992).

---

*Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA MACON DIVISION

HERBERT J. HEICHELBECH, et al.,	:	C.A. 91-118-1-MAC
Defendant. [sic]	:	(WDO)
vs.	:	PUBLISH
DAVID L. EVANS, et al., Defendants.	:	(Filed Sept. 2, 1992)

ORDER

Before the court is a motion for partial summary judgment filed by plaintiff Heichelbech and plaintiff-intervenors Reid and Fleming. Plaintiff and plaintiff-intervenors are incapacitated adults acting through a guardian ad litem, and in their motion, they seek declaratory and injunctive relief against defendant employees of the State of Georgia for their policy of not discharging a voluntary patient from a state mental hospital without the consent of the patient's legal guardian.

Plaintiff and plaintiff-intervenors seek a declaratory judgment that the State policy concerning voluntary patient discharge violates their rights to due process and equal protection under § 1983. They also seek an injunction to enjoin defendants from enforcing this policy in the future. In addition, if the court grants plaintiffs' motion, they intend to seek monetary damages from the State defendants in their individual capacities under § 1983.

The State defendants, who are officers of the Georgia Division of Mental Health, Mental Retardation and Substance Abuse or of Central State Hospital, have filed a motion for summary judgment based upon qualified immunity.

Prior to the filing of this motion, the parties agreed not to serve the complaints of the plaintiff-intervenors upon defendants. Therefore, as plaintiff-intervenors are not proper parties to this action, any relief granted in this order applies only to plaintiff Heichelbech's claim.

FACTS

In this case, plaintiff Heichelbech is an incapacitated adult who is a former voluntary patient at Central State Hospital ("Hospital"). He has a history of repeated admissions to psychiatric facilities for treatment of mental illness. He was originally admitted to the Hospital as an involuntary patient[1] on May 13, 1988, and his mother was appointed his legal guardian shortly thereafter. His mother, as legal guardian, transferred plaintiff's status to that of voluntary patient[2] on May 26, 1988.

---

[1] A "[m]entally ill person requiring involuntary treatment" is "a person who is mentally ill and (A) who presents a substantial risk of imminent harm to himself or others, as manifested by either recent overt acts or recent expressed threats of violence which present a probability of physical injury to himself or to other persons, or (B) who is so unable to care for his own physical health and safety as to create an imminently life-endangering crisis. O.C.G.A. § 37-3-1(12).

[2] The status of an involuntary patient may be transferred to that of voluntary patient if the patient has been declared legally

On February 15, 1990, plaintiff submitted a written request to defendants for discharge from the Hospital. His legal guardian did not consent to his request. The Hospital neither discharged plaintiff as he requested nor conducted an involuntary civil commitment hearing to determine if he should be transferred back to involuntary patient status.

On March 6, 1990, defendant Hall, a designee of the Chief Medical Officer at the Hospital, reviewed plaintiff's medical records. Hall determined that plaintiff did not meet the involuntary patient criteria and was ready for discharge if an appropriate placement were available. However, Hall also determined that plaintiff was not fully recovered from his mental disability and could still benefit from additional hospitalization.

At this time, no suitable alternative placement was available to plaintiff, and plaintiff's guardian refused either to consent to plaintiff's discharge or to accept plaintiff into her home if he were discharged. Thus, despite his request, plaintiff was not discharged from the Hospital or afforded an involuntary commitment hearing.

Plaintiff again submitted a written request for discharge on January 3, 1991, and his attorney submitted another request on March 2, 1991. However, he was not discharged until August 14, 1991, when a suitable alternative placement for him was found and his guardian consented to his discharge.

---

incompetent, the patient's guardian consents to the transfer, and the patient demonstrates some evidence of mental illness and is suitable for treatment. O.C.G.A. § 37-3-20.

Defendants admit that while plaintiff was a patient in the Hospital, the State had a special policy regarding the discharge of voluntary patients with legal guardians: if a patient had a legal guardian, that patient was not discharged or afforded an involuntary commitment proceeding without the consent of his legal guardian. This policy was based upon the State's interpretation of O.C.G.A. § 37-3-22(a), the statute applying to voluntary patient discharge:

> A voluntary patient, . . . , who has admitted himself to a facility pursuant to subsection (a) of Code Section 37-3-20 or any voluntary patient's personal representative, legal guardian, parent, spouse, attorney, or adult next of kin may request such patient's discharge in writing at any time after his admission. If the patient was admitted on his own application and the request for discharge is made by a person other than the patient, the discharge shall be conditioned upon the agreement of the patient thereto, unless such other person is the legal guardian of the patient's person. Within 72 hours, excluding Sundays and legal holidays, of the delivery of a written request for release to the chief medical officer, the patient must be discharged from the facility, unless the chief medical officer finds that the discharge would be unsafe for the patient or others, in which case proceedings for involuntary treatment must be initiated.

According to defendants, under this statute, a voluntary patient does not have a right to request a discharge if he was admitted to the Hospital by his legal guardian; only his guardian can request a discharge. In contrast, plaintiff contends that the statute gives a voluntary

patient the right to request a discharge whether or not his legal guardian consents.

This court addressed the question of the proper interpretation of O.C.G.A. § 37-3-22(a) in an order entered on March 23, 1992. The court held that O.C.G.A. § 37-3-22(a) unambiguously states that "any voluntary patient's . . . attorney . . . may request such patient's discharge in writing at any time after his admission," and upon such request, a state hospital must either discharge the patient or initiate proceedings for involuntary commitment within 72 hours. Because plaintiff's attorney had submitted a written request for plaintiff's discharge, the designated statutory procedures for discharge should have been invoked. Therefore, defendants' failure either to discharge plaintiff or to initiate involuntary commitment proceedings violated the statute. Since this order was entered, defendants have agreed to comply with the court's interpretation of the statute.

Plaintiff now seeks a declaratory judgment that defendants violated his rights to due process and equal protection when they failed to discharge him from the Hospital or to initiate involuntary commitment proceedings. He also seeks an injunction ordering defendants to comply with the statute in the future. In addition, if plaintiff receives a favorable ruling, he will seek compensatory damages from defendants in their individual capacities under § 1983. Defendants seek summary judgment against a potential damages claim based upon qualified immunity.

DISCUSSION

In order to prevail on his § 1983 claim, plaintiff must show 1) that he has been deprived of a right created by federal law or under the United States Constitution and 2) that the person or entity which deprived him of the right was acting under color of state law. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). Plaintiff contends that defendants denied him his rights to procedural due process and equal protection when they neither discharged him nor began involuntary commitment proceedings after he requested a discharge. There is no dispute that defendants, as state mental health officers, are state actors.

I. Due Process

To support a procedural due process claim, plaintiff must first show that he was deprived of a significant interest protected under the Constitution. *Addington v. Texas*, 441 U.S. 418, 425 (1979). This interest can arise either from the Constitution itself or from state law. *Hewitt v. Helms*, 459 U.S. 460, 466 (1983).

It is well-established that the right to be free from unwarranted involuntary commitment to a mental hospital is a significant liberty interest entitled to due process protection under the Fourteenth Amendment. *Humphrey v. Cady*, 405 U.S. 504, 509 (1972). It is clear that plaintiff's continued confinement in the Hospital after he requested a discharge deprived him of his liberty.

Plaintiff was also deprived of a liberty interest created by state law. The Georgia Code, O.C.G.A. § 37-3-1 *et seq.*, provides detailed procedures for the admission and

continued confinement of mentally ill patients in state mental hospitals. Section 37-3-22(a) specifically gives a voluntary patient the right to be discharged from a mental hospital or to be afforded an involuntary commitment hearing within 72 hours after he requests a discharge. The language of this provision contains terms such as "shall" and "must" that require a hospital to follow these procedures. The "unmistakably mandatory character" of this language "demands a conclusion that the State has created a protected liberty interest" for persons like plaintiff, who have been classified as voluntary patients. *Hewitt v. Helms,* 459 U.S. 460, 471-72 (1983). The Hospital failed to comply with the required procedures after plaintiff requested a discharge; therefore, plaintiff was deprived of this state-created liberty interest.

Once plaintiff has established that he was deprived of a significant liberty interest, the court must determine whether he suffered this deprivation without due process. *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972). This determination is made by asking "what process the State provided, and whether it was constitutionally adequate." *Zinermon v. Burch,* 494 U.S. 113, 126 (1990).

In this case, the only "process" that plaintiff received after he requested a discharge was that some of the defendants reviewed his medical records. He was never afforded an involuntary commitment hearing and was not discharged until eighteen months after his request, when his guardian consented to it.

Defendants contend that a review of medical records is the only "process" to which plaintiff is entitled when he is a voluntary patient. However, this argument fails

because, in these circumstances, plaintiff was not a true voluntary patient. Georgia law defines his commitment as voluntary because his condition was not severe enough to require involuntary commitment and because his guardian consented to his commitment. However, plaintiff himself did not consent to his commitment; hence, his continued confinement in the Hospital was involuntary. *See Doe v. Austin*, 848 F.2d 1386 (6th Cir. 1988) (state commitment of mentally retarded adults upon application by a guardian is involuntary), *cert den.*, 488 U.S. 967 (1988). As an involuntary patient, plaintiff was entitled to the due process protections that the State must provide to justify an involuntary commitment. Due process requires the State to show through clear and convincing evidence that a person to be involuntarily committed meets the following criteria: (1) He must be mentally ill and (2) he must be dangerous to himself and others. *Addington v. Texas*, 441 U.S. 418, 425 (1979).

Moreover, once a patient has been legally committed to a mental hospital against his will, due process requires periodic reviews of his condition to continue his involuntary commitment. *O'Connor v. Donaldson*, 422 U.S. 563 (1975). If a patient is no longer mentally ill or dangerous, then it is unconstitutional to confine him against his will. *See Foucha v. Louisiana*, 112 S.Ct. 1780 (1992) (holding that an insanity acquitee, although still considered dangerous, has right to discharge or involuntary commitment proceedings when he is no longer mentally ill). At the time of his request for discharge, plaintiff only met the criteria for voluntary commitment; therefore, he was entitled either to be discharged or afforded an involuntary commitment hearing. Nevertheless, the State contends that

even if plaintiff was entitled to the due process protections of an involuntary patient, the State's failure to invoke these protections in plaintiff's case was still constitutionally adequate.

This argument is based upon the fact that plaintiff is an incapacitated adult with a legal guardian. As an incapacitated adult, the patient cannot act on his own behalf. Therefore, according to the State, only the guardian should be able to invoke due process procedures on behalf of his incapacitated ward.

It is true that when a court appoints a guardian for an incapacitated person, that person loses certain rights under Georgia law. For example, a ward loses the power to consent to medical treatment and the power to establish his residence. O.C.G.A. § 29-5-7(d)(3)&(4). However, there is a big difference between the right to challenge one's involuntary confinement in a mental hospital and the rights to establish a residence and to refuse medical treatment. In fact,

> No more vital right exists in our society than the ability to challenge [involuntary] commitments through adequate due process. To require the individuals so confined to obtain the consent of their keepers in order to launch those challenges would render the right meaningless.

Bonnie S. v. Altman, 683 F. Supp. 100, 101 (D.N.J. 1988). Furthermore, the Georgia Code expressly states that an incapacitated adult "shall not be deprived of any civil, political, personal, or property rights without due process of law." O.C.G.A. § 29-5-7(a).

Despite the importance of this right, defendants contend that because an incapacitated person loses certain powers to his guardian when a guardian is appointed for him, only the guardian can make the decision of whether an incapacitated person should remain in a mental institution. They rely on *Parham v. J.R.*, 442 U.S. 584 (1979), to support this argument.

In *Parham*, the Supreme Court found that Georgia's procedure of admitting a minor as a voluntary patient into a state mental hospital upon the application of his parent satisfied due process. No formal hearing on the legitimacy of the confinement was necessary; an informal inquiry by a neutral fact finder to determine whether the statutory requirements for voluntary admission were met was sufficient. *Id.* at 607.

The procedure was constitutionally adequate even when the minor was against being institutionalized. The Court found that the parents "retain a substantial, if not the dominant, role in the decision [to institutionalize their child], . . . and that the traditional presumption that the parents act in the best interests of their child should apply." *Id.* at 604. Therefore, a parent can have his child "voluntarily" committed to an institution even when the child is against it.

However, the Court also concluded that the parent is not given unlimited discretion:

> [T]he child's rights and the nature of the commitment decision are such that parents cannot always have absolute and unreviewable discretion to decide whether to have a child institutionalized. They, of course, retain plenary authority to seek such care for their children,

> subject to a physicians's [sic] independent examination and medical judgment.

Id. Thus a child can be institutionalized against his wishes with the consent of his parent only if a physician conducts an informal inquiry to determine if the child meets the voluntary admission requirements.

The State contends that the procedure for admitting a minor by his parents in *Parham* is analogous to the situation in this case. At the time of his discharge request, a physician reviewed plaintiff's medical records and determined that plaintiff met the criteria for voluntary commitment – he showed some evidence of mental illness and could benefit from hospitalization. Moreover, his guardian consented to his hospitalization. A physician's informal inquiry, defendants argue, was all that was required under *Parham* in these circumstances.

However, there are several distinctions between the circumstances in *Parham* and those in this case. First, *Parham* dealt exclusively with minors. In contrast, plaintiff in this case is an incapacitated adult. The relationship between a parent and his minor child is very different from the relationship between a guardian and his adult ward.

The Sixth Circuit discussed the distinction between the parent-child relationship and the adult-guardian relationship in *Doe v. Austin,* 848 F.2d 1386 (6th Cir. 1988), *cert den.,* 488 U.S. 967 (1988). In *Doe,* the court found that *Parham* did not apply to the involuntary commitment of mentally retarded patients with guardians:

> The Court in *Parham* was concerned with the commitment of minor children, and its conclusions flow more or less naturally from the unique and traditional relationship shared between parent and child. . . . "Once someone becomes an adult, one's parents lose that degree of authority found so crucial in *Parham.*" . . . Moreover, the interest of the parents in avoiding "significant intrusion into the parent-child relationship," as noted in *Parham,* . . . is simply not as great in the case of an adult.

Id. at 1393 (cites omitted). Therefore, an adversary proceeding was required for the initial and continued commitment of mentally retarded persons with guardians to satisfy due process.

Parham also can be distinguished from the case at bar because it only applies to procedures for the initial admission of minors. The initial admission of plaintiff to the Hospital is not being challenged. Furthermore, in *Parham,* the Court expressly stated:

> [W]e have no basis for determining whether the review procedures of the various hospitals are adequate to provide the process called for or what process might be required if a child contests his confinement by requesting a release. These matters require factual findings not present in the District Court's opinion.

Parham, at 617 (emphasis added). Since this case only involves a challenge to the process provided when an incapacitated adult requests a release, *Parham,* by the Supreme Court's own language, is inapplicable.

Hence, plaintiff has shown the court that defendants violated his rights to due process. He had a constitutionally protected interest in being free from involuntary confinement, and due process requires that he be afforded an adversary proceeding to challenge his confinement. The State's policy of discharging a voluntary patient or affording him an involuntary commitment hearing only upon the request of the patient's guardian deprived plaintiff of his right to challenge his confinement and violated due process.

II. Equal Protection

Plaintiff also contends that defendants violated his rights to equal protection by distinguishing between voluntary patients with legal guardians and those without in its discharge procedure. Defendants' policy at the time of plaintiff's commitment was only to discharge a voluntary patient with a guardian after the guardian consented to the discharge. In contrast, a voluntary patient without a guardian was discharged or provided with an involuntary commitment hearing immediately. Plaintiff argues that there is no rational basis for this distinction.

In order to overcome an equal protection challenge, the state must show that the classification is rationally related to a legitimate state purpose. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985). Defendants contend that the fact that plaintiff has a legal guardian provides a rational basis for distinguishing plaintiff from voluntary patients without guardians.

The court agrees with defendants' contention. Because of the special nature of the relationship between

a guardian and his ward and the legal problems unique to that relationship, defendants have a rational basis for treating voluntary patients with guardians differently from those without. Therefore, plaintiff's equal protection claim must fail.

III. Qualified Immunity

Defendants contend that they are entitled to qualified immunity from plaintiff's § 1983 claims against them in their individual capacities:

> [G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Harlow v. Fitzgerald, 457 U.S. 800 (1982).

Decisions concerning civil commitment are discretionary functions. *Estate of Gilmore v. Buckley,* 608 F. Supp. 554, 561 n.12 (D. Mass. 1985) ("There is no question that civil commitment decisions are discretionary functions to which qualified immunity attaches."), *aff'd,* 787 F.2d 714 (1st Cir.), *cert den.,* 479 U.S. 882 (1986).

In order to overcome defendants' claim of qualified immunity, plaintiff must show that defendants violated a clearly established right. *Zeigler v. Jackson,* 716 F.2d 847 (11th Cir. 1983). Plaintiff has failed to meet this burden for he has cited no clearly established law concerning the right of incapacitated adults with legal guardians to challenge their commitment without the consent of their guardians. In addition, plaintiff has failed to show that

the contours of the right are sufficiently clear that "a reasonable official would understand that what he is doing would be a violation of that right." *Anderson v. Creighton*, 483 U.S. 635 (1987).

Defendants have shown that they were acting in good faith in not discharging plaintiff or affording him an involuntary commitment hearing when his guardian did not consent to his request for discharge. They enforced this practice based upon advice from the Attorney General's Office that this policy was in compliance with state and federal law. Hence, they are immune from plaintiff's claim against them in their individual capacities for damages under § 1983.

CONCLUSION

Defendants violated plaintiff's due process rights in failing to discharge him or to afford him an involuntary commitment hearing when he requested a discharge. Accordingly, the court **GRANTS** plaintiff's motion for partial summary judgment in part and **DECLARES** that defendants' practice of refusing to invoke the procedures designated in O.C.G.A. § 37-3-22(a) for voluntary patients with legal guardians violates due process.

However, the court does not find that defendants' practice violates equal protection; therefore, the court **DENIES** plaintiff's motion for partial summary judgment on this claim. Furthermore, as defendants have agreed to comply with the court's interpretation of O.C.G.A. § 37-3-22(a) in the future such that it applies to voluntary patients with guardians, there is no need for an injunction demanding compliance. Until such time as plaintiff

shows that defendants are not complying with the court's interpretation of the statute and injunctive relief is necessary, the court **DENIES** plaintiff's request for injunctive relief.

Finally, the court finds that defendants are entitled to qualified immunity from plaintiff's claims against them in their individual capacities. Accordingly, the court **GRANTS** defendants' motion for summary judgment against plaintiff's claims for damages.

SO ORDERED, this 1st day of September, 1992.

/s/ Wilbur D. Owens, Jr.,
WILBUR D. OWENS, JR.,
UNITED STATES DISTRICT JUDGE

EL:lab

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA MACON DIVISION

HERBERT J. HEICHELBECH III, et al., Plaintiffs,	:	C.A. 91-118-1-MAC (WDO)
vs.	:	
DAVID L. EVANS, et al., Defendants.	:	

ORDER

(Filed March 23, 1992)

Before the court is a question on the proper interpretation of O.C.G.A. § 37-3-22(a), which governs the right of a voluntary mental patient to request a discharge from the facility in which he is receiving treatment. In addition to this state law question, plaintiffs have raised federal constitutional issues. However, the court finds that the state statute at issue is sufficient to establish plaintiffs' right to request a discharge. Therefore, it is unnecessary for the court to address plaintiffs' constitutional arguments.

FACTS

In this case, the plaintiffs, three current or former voluntary patients at Central State Hospital ("Hospital"), are challenging the Hospital's policy of refusing to grant a request for discharge made by a voluntary patient and his attorney when his legal guardian does not consent to

the discharge. Plaintiff Herbert J. Heichelbech, III originally filed this action, and plaintiffs James Reid, III, and May I. Flemming have intervened in this action.

Each of these plaintiffs are former or current "voluntary patients" of the Hospital who were admitted by their legal guardians. After admission, each plaintiff made an oral and written request for discharge from the Hospital. In addition, each plaintiff's attorney made a written request for his client's discharge. Defendant officers at the Hospital denied these requests because no request was made by a plaintiff's guardian.

Plaintiff Heichelbech was discharged from the Hospital on August 14, 1991, to an alternative placement after his guardian consented to his discharge. The Hospital has neither discharged the other two plaintiffs nor determined that they need involuntary treatment. All three plaintiffs have a history of repeated admissions to the Hospital and other psychiatric facilities for treatment of mental illness.

DISCUSSION

A minor issue to be addressed by the court is whether plaintiff Heichelbech's claim has been rendered moot since he has been discharged from the Hospital. The court finds that his claim is not moot because it is likely that plaintiff Heichelbech will be confined in the Hospital in the future. Therefore, plaintiff Heichelbech's claim is "capable of repetition, yet evading review," *Lynch v. Baxley*, 744 F.2d 1452 (11th Cir. 1984), and may be heard by this court.

Defendants contend that, under O.C.G.A. § 37-3-22(a), a voluntary patient who was admitted to the Hospital by his legal guardian can only be discharged if his guardian requests a discharge. The patient, his attorney, or any other representative of the patient cannot make a request for discharge.

However, this policy directly contradicts the language of § 37-3-22(a), which states as follows:

> **A voluntary patient,** . . . , who has admitted himself to a facility pursuant to subsection (a) of Code Section 37-3-20 **or any voluntary patient's personal representative,** legal guardian, parent, spouse, **attorney**, or adult next of kin **may request such patient's discharge** in writing at any time after his admission. . . . Within 72 hours, excluding Sundays and legal holidays, of the delivery of a written request for release to the chief medical officer, the patient **must be discharged** from the facility, unless the chief medical officer finds that the discharge would be unsafe for the patient or others, in which case proceedings for involuntary treatment **must be initiated**. . . .

Thus, the statute unambiguously states that parties other than a voluntary patient's legal guardian may request a discharge of the patient, and, once this request is made, the Hospital must discharge the patient or initiate proceedings for involuntary treatment.

In this case, each plaintiff's attorney requested her client's discharge; therefore, the Hospital was compelled to either discharge the plaintiff or initiate proceedings for involuntary treatment. Instead, the Hospital ignored the

attorney's request for discharge because plaintiff's guardian did not make the request. Therefore, the Hospital violated each plaintiff's right to request discharge under state law.

Accordingly, the court HOLDS as follows:

(1) Under O.C.G.A. § 37-3-24(a), a voluntary patient who was admitted to the Hospital by his legal guardian can request a discharge from the Hospital through his attorney or other personal representative without the consent of his legal guardian.

(2) When such a request for discharge is made, the Hospital must either discharge the patient or initiate proceedings for involuntary treatment within 72 hours.

In addition, the court requests that the parties inform the court within thirty (30) days of any issues remaining to be decided in this case.

SO ORDERED, this 23rd day of March, 1992.

/s/ Wilbur D. Owens, Jr.
WILBUR D. OWENS, JR.,
UNITED STATES
DISTRICT JUDGE

EL:lab

APPENDIX D

The following are the relevant sections of Georgia's Mental Health Code, Chapter 3 of Title 37 of the Official Code of Georgia Annotated.

O.C.G.A. § 37-3-20(a)

> (a) The chief medical officer of any facility may receive for observation and diagnosis any patient 12 years of age or older making application therefor, any patient under 18 years of age for whom such application is made by his parent or guardian, and any patient who has been declared legally incompetent and for whom such application is made by his guardian. If found to show evidence of mental illness and to be suitable for treatment, such person may be given care and treatment at such facility; and such person may be detained by such facility until discharged pursuant to Code Section 37-3-21 or 37-3-22. The parents or guardian of a minor child must give written consent to such treatment. An individualized service plan shall be developed for such person as soon as possible.

O.C.G.A. § 37-3-22(a)

> (a) A voluntary patient, other than a minor child for whom admission has been sought by his parents or guardian, who has admitted himself to a facility pursuant to subsection (a) of Code Section 37-3-20 or any voluntary patient's personal representative, legal guardian, parent, spouse, attorney, or adult next of kin may request such patient's discharge in writing at any time after his admission. If the patient was admitted on his own application and the request

for discharge is made by a person other than the patient, the discharge shall be conditioned upon the agreement of the patient thereto, unless such other person is the legal guardian of the patient's person. The request for discharge may be submitted to the chief medical officer or to any staff physician or staff registered nurse of the facility for transmittal to the chief medical officer. If the patient or another on his behalf makes an oral request for release to any member of the staff or other service provider, the patient must within 24 hours be given assistance in preparing a written request. The person to whom a written request is submitted shall deliver the request to the chief medical officer within 24 hours, Saturdays, Sundays, and legal holidays excluded. Within 72 hours, excluding Sundays and legal holidays, of the delivery of a written request for release to the chief medical officer, the patient must be discharged from the facility, unless the chief medical officer finds that the discharge would be unsafe for the patient or others, in which case proceedings for involuntary treatment must be initiated under either Code Section 37-3-41 or Code Section 37-3-61.

The following are the relevant sections of Georgia's Guardianship Code, Chapter 5 of Title 29 of the Official Code of Georgia Annotated.

29-5-6. Procedure for appointment of guardian.

(a)(1) Any interested person or persons, including the alleged incapacitated person, and including the

Department of Human Resources in the case of an allegedly incompetent person who is receiving services from the department or whom the department believes to be eligible for such services, may file a petition under oath for the appointment of a guardian. The petition shall be filed with the probate court in the county where the alleged incapacitated person resides or is found, provided that the probate court of the county where the proposed ward is found shall not have jurisdiction to hear any guardianship petition if it appears that the proposed ward was removed to that county solely for the purposes of filing such an action.

(2) The petition for the appointment of a guardian shall set forth:

(A) The name, age, address, and county of residence of the proposed ward, if known;

(B) The name, address, and county of residence of the petitioner;

(C) The relation of the petitioner to the proposed ward;

(D) A statement of the reasons the proposed guardianship is sought, including the facts which support the claim of incapacity;

(E) The type of and any foreseeable limits on duration of guardianship sought;

(F) The names and addresses of the spouse and all adult children of the proposed ward who are living and whose addresses are known; or, if none, then the names and addresses of the two next of kin who are living and whose addresses are known; or, if only one next of kin, then that

one; or, if none, then the names and addresses of two adult friends;

(G) The names and addresses of the representatives of the alleged incompetent, if appointed under Code Sections 37-1-1 and 37-3-1 through 37-3-6 and Articles 2 through 6 of Chapter 3 of Title 37; Code Sections 37-4-1 through 37-4-3 and 37-4-5 through 37-4-8, Articles 2 through 5 of Chapter 4 of Title 37, and Code Section 37-5-3; or Code Sections 37-7-1, 37-7-2, and 37-7-4 through 37-7-7 and Articles 2 through 6 of Chapter 7 of Title 37 and known to petitioner;

(H) All known income and assets of the proposed ward and, in any case involving the creation or termination of a guardianship over property where the proposed ward has an interest in real property, the name of the county in which such property is located; and

(I) The name and address of any person or persons nominated by the petitioner or petitioners to serve as guardian and whether the person or persons have consented or will consent to serve as guardian.

(3) In all cases, except those sworn to by two or more petitioners under oath and except those involving detention by a foreign power or disappearance, the petition shall be supported by an affidavit of a physician licensed to practice medicine under Chapter 34 of Title 43 or of a psychologist licensed to practice under Chapter 39 of Title 43 or, if the proposed ward is a patient in any federal medical facility in which neither such physician nor such psychologist is available, a physician authorized to practice medicine in that federal facility stating that he

has examined the proposed ward within ten days prior to the filing of the petition and that based on the examination the proposed ward was determined:

> (A) To be incapacitated by reason of mental illness, mental retardation, mental disability, advanced age, physical illness or disability, chronic use of drugs or alcohol, or other cause, to the extent that the person lacked sufficient understanding or capacity to make significant responsible decisions or the ability to communicate such decisions concerning his person;
>
> (B) To be incapacitated by reason of mental illness, mental retardation, mental disability, advanced age, physical illness or disability, chronic use of drugs or alcohol, or other cause, to the extent that the person is incapable of managing his estate; or
>
> (C) To be incapacitated as indicated in both subparagraph (A) and subparagraph (B) of this paragraph.

(4) In addition to stating the specific incapacity of the proposed ward and the facts which support the determination, the affidavit shall state any foreseeable limits on the duration of such incapacity.

(b)(1) Upon the filing of the petition, the judge of the probate court shall review the petition and affidavit, if any, and determine whether there is sufficient evidence to believe that the proposed ward is incapacitated within the meaning of Code Section 29-5-1.

(2) If the judge of the probate court determines that there is such evidence, the judge shall:

(A) immediately notify the proposed ward of the proceedings by personal service of all pleadings on the proposed ward by an officer of the court;

(B) Inform the proposed ward of the place and time at which the proposed ward shall submit to the evaluation provided for by subsection (c) of this Code section and of the right to independent counsel and that the court will appoint counsel within two days unless the proposed ward indicates that he has retained counsel by that time;

(C) Give notice of the petition by first-class mail to the spouse and all adult children of the proposed ward whose addresses are known; or, if none, order notice of the petition by first-class mail to the two next of kin whose addresses are known, or, if only one, then that one; or, if none, order notice of the petition by first-class mail to two adult friends of the ward;

(D) Upon application of any interested person or on the court's own motion, consider whether to appoint a guardian ad litem, provided that the decision as to whether to appoint a guardian ad litem shall be in the sole discretion of the judge of the probate court. The guardian ad litem, if an attorney, may also be appointed as counsel for the proposed ward, as provided in subparagraph (B) of this paragraph; and in such a case the person so appointed may be compensated both as the attorney and as the guardian ad litem, as provided in subsections (e) and (f) of Code Section 29-5-13; and

(E) Appoint a guardianship evaluation physician or psychologist as provided in subsection (c) of this Code section.

(3) If the probate court determines that there is insufficient evidence to believe that the proposed ward is incapacitated within the meaning of Code Section 29-5-1, the judge shall dismiss the petition and provide the proposed ward with a copy of the petition, affidavit, and order of dismissal.

(c)(1) The court shall, if the petition is not dismissed under paragraph (3) of subsection (b) of this Code section, appoint an evaluation physician or psychologist who shall be a physician licensed to practice medicine under Chapter 34 of Title 43 or a psychologist licensed to practice under Chapter 39 of Title 43 or, if the proposed ward is a patient in any federal medical facility in which neither such physician nor such psychologist is available, a physician authorized to practice medicine in that federal facility, other than the physician or psychologist who completed an affidavit attached to the petition pursuant to paragraph (3) of subsection (a) of this Code section.

(2) The physician or psychologist shall evaluate the proposed ward.

(3) The physician or psychologist shall explain the purpose of the evaluation to the ward. The proposed ward may remain silent. Any statements made by the proposed ward during the evaluation shall be privileged but such statements shall be competent evidence in a proceeding under this chapter only. The ward's attorney may be present but shall not participate in the evaluation.

(4) The evaluation shall be conducted with as little interference with the proposed ward's activities as possible. The evaluation shall take place at the place and time set in the notice to the proposed ward; and the time

set in the notice to the proposed ward shall not be sooner than the fifth day after service of the notice on the proposed ward. The judge of the probate court, however, shall have the power to change the place and time of the examination at any time upon reasonable actual notice being given to the proposed ward. If the proposed ward fails to appear, the judge of the probate court may order that the proposed ward be taken directly to and from a medical facility or the office of the physician or psychologist for purposes of evaluation only. The evaluation shall be conducted during the normal business hours of the facility or office and the ward shall not be detained in the facility or office overnight.

(5) A written report shall be filed with the court no later than seven days after the date of the examination.

(6) The report shall be signed under oath by the physician or psychologist. It shall:

(A) State the duration and circumstances of the evaluation, including a summary of questions or tests utilized;

(B) List all persons and other sources of information consulted in evaluating the proposed ward;

(C) Describe the proposed ward's mental and physical state and condition, including all observed facts considered by the physician or psychologist;

(D) Describe the overall social condition of the proposed ward, including support, care, education, and well-being; and

(E) Describe the needs of the proposed ward and their foreseeable duration.

(d) After the filing of the evaluation report, the probate court shall review the petition and the evaluation report.

(1) If, after the review, the court finds that there is probable cause to support a finding that the proposed ward is incapacitated within the meaning of Code Section 29-5-1, the probate court shall schedule a hearing on the petition. Notice of the hearing and a copy of the evaluation report shall be served by first-class mail upon the proposed ward and his attorney and his guardian ad litem, if any, and upon the petitioner or his attorney, if any. The date of the hearing shall be not less than ten days after the date notice is mailed. Either the proposed ward or the petitioner may file a written response to the evaluation report at any time up to the conclusion of the hearing. The response may include, but is not limited to, independent evaluations, affidavits of individuals with personal knowledge of the proposed ward, and a statement of applicable law.

(2) If after the review the court finds that there is not probable cause to support a finding that the proposed ward is incapacitated within the meaning of Code Section 29-5-1, the probate court shall dismiss the petition.

(e)(1) The hearing shall be held in a regular courtroom, if available, or otherwise at such place as the judge may set. At the request of the proposed ward or the ward's attorney and for good cause shown, the public may be excluded and the appearance of the ward may be waived; in any case, the court shall utilize its discretion and the record shall reflect the reasons for the court's action.

(2) The hearing shall be either recorded by a sound-recording device and the tape retained for not less than 45 days or recorded by a certified court reporter.

(3) The court shall apply the rules of evidence applicable in civil cases. The proposed ward shall have the right to assistance of counsel and to subpoena and cross-examine witnesses, including the evaluation physician or psychologist. Upon agreement of the parties, evidence may be presented by deposition.

(4) The court shall utilize the criteria found in Code Section 29-5-1 and 29-5-7 and shall make an independent determination of the need for a guardianship based upon the evaluation report, the response filed by the ward, and the evidence taken at the hearing. The burden of proof shall be upon the petitioner and the standard used by the court in reaching its decision shall be clear and convincing evidence.

(5) If the court determines that a guardian is necessary and the proposed ward is present, the court may inquire whether the proposed ward wishes to suggest any person as guardian.

(6) In any procedure under this chapter in which the judge of the probate court is unable to hear a case within the time required for such hearing, the judge shall appoint a person to serve and exercise all the jurisdiction of the probate court in the case. Any person so appointed shall be a member of the State Bar of Georgia who is, in the opinion of the appointing judge, otherwise qualified for his duties by training and experience. The appointment may be made on a case-by-case basis or by making a

standing appointment of one or more persons. Any person receiving a standing appointment shall serve at the pleasure of the judge making the appointment or his successor in office, to hear such cases if and when necessary. The compensation of a person so appointed shall be as agreed upon by the judge who makes the appointment and the person appointed, with the approval of the governing authority of the county for which the person is appointed, and shall be paid from the county funds of said county. All fees collected for the services of the appointed person shall be paid into the general funds of the county served.

(f)(1) In its order the court shall set forth the findings of fact and conclusions of law which support the grant or denial of the petition. If a guardianship is granted, the order shall specify:

(A) The type of guardianship established, whether of the person or property, or both;

(B) The names of the guardian or guardians and the reason for their selection;

(C) The nature and extent of the ward's incapacity;

(D) Any rights or powers retained by the ward pursuant to subsection (d) or (c) of Code Section 29-5-7;

(E) The duration of the guardianship, whether limited or permanent;

(F) If separate guardians for the person and the property of the ward are appointed or if only a personal guardian is appointed, the reasonable sums or property to be provided the guardian of the person to provide adequately

for the ward's support, care, education, and well-being, subject to modification by subsequent order of the court;

(G) The type and frequency of physical, mental, and social evaluations of the ward's condition which the court requires to supplement the reports submitted pursuant to paragraph (10) of subsection (b) of Code Section 29-5-3;

(H) Any reporting requirements in addition to those required by law;

(I) Any bonding requirements in addition to those required by law;

(J) In any case involving the creation or termination of a guardianship over property where the proposed ward has an interest in real property, the name of the county in which such property is located; and

(K) Such other and further provisions of the guardianship as the court may deem proper.

(2) Service of the court's order shall be made by mail upon the ward; his attorney; his representatives; his guardian ad litem, if any; the guardian, if appointed; and the petitioner.

(3) After service of the court's order, the ward's counsel shall make reasonable efforts to explain the order and the ward's rights to him. If the ward desires to appeal the court's order, the attorney shall file such notice in the ward's behalf; and, if counsel was appointed by the probate court, the appointment shall continue on appeal to the superior court.

(4) In any case involving the creation of a guardianship over the property of an adult where the proposed ward owns real property, the judge or clerk of the probate court shall file, within 30 days after issuing the order granting such petition or terminating such guardianship during the ward's lifetime, a certificate with the clerk of the superior court of each county of this state in which such adult owns real property, to be recorded in the deed records for such county and indexed under the name of such adult in the grantor index to such records. The certificate shall set forth the name of such adult, the expiration date of such guardianship if limited by the court's order, the date on which the order granting such petition or terminating such guardianship issued, and, where a guardianship was created, the name of the guardian of the property who was appointed. The certificate which is required to be filed by this Code section shall be accompanied by the same fee required for the filing of deeds with the clerk of the superior court. The filing fee and any fee for the certificate shall be taxed as costs to the estate.

O.C.G.A. § 29-5-7(d)

> Unless the court's order specifies that one or more of the following powers are to be retained by the ward, the appointment of a guardian of the person shall remove from the ward:
>
> * * *
>
> (3) The power to consent to medical treatment;

(4) The power to establish a residence or place of abode;